

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVID W. BURTON,

Plaintiff,

v.

E.J. HALE, *et al.*,

Defendants.

CASE NO. C06-654-MJP-JPD

REPORT AND RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

This is a civil rights action brought under 42 U.S.C. § 1983. Plaintiff David Burton alleges in his complaint violations of his constitutional rights arising out of a rape/murder investigation conducted by E.J. Hale, a detective with the Kent Police Department. Plaintiff names as defendants in this action Detective Hale and the Kent Police Department. Plaintiff seeks compensatory and punitive damages.

Defendants have filed a motion for summary judgment in which they argue that plaintiff's lawsuit should be dismissed in its entirety. Plaintiff has filed a response opposing defendants' motion. The briefing is now complete and this matter is ripe for review. This Court, having reviewed defendants' motion, plaintiff's response thereto, and the balance of the record, concludes that

REPORT AND RECOMMENDATION

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1 defendants' summary judgment motion should be granted and this action should be dismissed with
2 prejudice.

3 FACTUAL AND PROCEDURAL BACKGROUND

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5 Plaintiff is currently incarcerated at the South Dakota State Penitentiary ("SDSP") in Sioux
6 Falls, South Dakota pursuant to a 2003 conviction for grand theft. (*See* Dkt. No. 30 at 12.) In 2005,
7 plaintiff was identified as a possible suspect in the 1980 murder of Dorothy Marie Silzel in Kent,
8 Washington. (*See* Dkt. No. 29 at 1-4 and Ex. 1 at 2-6.) On November 14, 2005, Detective Hale, with
9 the assistance of Nate Leuning, an agent with the South Dakota Division of Criminal Investigation,
10 obtained a search warrant for plaintiff's DNA from Circuit Judge Gene Keau in the Second Judicial
11 Circuit for the State of South Dakota, County of Minnehaha. (Dkt. No. 29, Ex. 1 at 7-8.)

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13 Judge Keau issued the warrant upon finding that the affidavit offered by Agent Leuning and
14 Detective Hale in support of the search warrant established probable cause to believe that plaintiff's
15 DNA would constitute evidence of the commission of the rape and murder of Dorothy Silzel. (*Id.*)
16 On November 15, 2005, Detective Hale and Agent Leuning went to SDSP where they executed the
17 warrant and collected two buccal (oral) swabs from plaintiff. (Dkt. No. 29 at 4-5.) On November 16,
18 2005, the buccal swabs were ordered released to the South Dakota Department of Criminal
19 Investigation for disposition to Detective Hale. (Dkt. No. 29, Ex. 1 at 11-12.)

20 DISCUSSION

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22 Plaintiff alleges in his complaint that Detective Hale violated his rights under the Fourth
23 Amendment by unreasonably demanding and seizing his DNA pursuant to the warrant without first
24 giving him his Miranda warnings and without first providing him the legal counsel he had requested.
25 Plaintiff also alleges in his complaint that Detective Hale caused him to be subjected to
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1 unconstitutional conditions of confinement within the South Dakota Department of Corrections
2 (“SDDOC”) because of the manner in which he conducted his investigation. Detective Hale and the
3 Kent Police Department now move for summary judgment.
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5 Summary Judgment

6 Summary judgment is appropriate when, viewing the evidence in the light most favorable to
7 the nonmoving party, there exists “no genuine issue as to any material fact” such that “the moving
8 party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A material fact is a fact
9 relevant to the outcome of the pending action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
10 248 (1986). Genuine issues of material fact are those for which the evidence is such that “a reasonable
11 jury could return a verdict for the nonmoving party.” *Id.*
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13 In response to a properly supported summary judgment motion, the nonmoving party may not
14 rest upon mere allegations or denials in the pleadings, but must set forth specific facts demonstrating a
15 genuine issue of fact for trial and produce evidence sufficient to establish the existence of the elements
16 essential to his case. *See Fed. R. Civ. P. 56(e)*. A mere scintilla of evidence is insufficient to create a
17 factual dispute. *See Anderson*, 477 U.S. at 252. In ruling on summary judgment, the court does not
18 weigh evidence to determine the truth of the matter, but “only determine[s] whether there is a genuine
19 issue for trial.” *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994).
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21 Kent Police Department

22 Defendants argue in their motion for summary judgment that the Kent Police Department is
23 not a recognized legal entity amenable to suit under § 1983. Defendants are correct.
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25 A local government unit or municipality can be sued as a “person” under § 1983. *Monell v.*
26 *Department of Social Servs., of City of New York*, 436 U.S. 658, 691 (1978). Thus, the City of Kent,

1 for example, is a legal entity which is suable under § 1983. Plaintiff, however, did not name the City
2 of Kent as a defendant in this action. Instead, he named the Kent Police Department as the party he
3 believes is liable for the harm alleged in his complaint. Police departments are generally not
4 considered suable entities separate from the city itself. *See West v. Waymire*, 114 F.3d 646, 647 (7th
5 Cir. 1997); *Ricketts v. City of Hartford*, 74 F.3d 1397, 1400 n. 1 (2d Cir. 1996); *Dean v. Barber*, 951
6 F.2d 1210, 1214-15 (1992). Because the Kent Police Department is not a legal entity subject to suit
7 under § 1983, plaintiff's claims against this defendant must be dismissed.

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9 Detective Hale

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11 Defendants argue in their motion for summary judgment that all of plaintiff's claims against
12 Detective Hale are barred by the doctrine of qualified immunity. Qualified immunity protects § 1983
13 defendants performing discretionary functions from liability for civil damages so long as their conduct
14 does not violate a clearly established statutory or constitutional right of which a reasonable person
15 would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

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17 In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court clarified the test to be applied in
18 evaluating claims of qualified immunity. The threshold inquiry in a qualified immunity analysis is
19 whether the facts alleged, when taken in the light most favorable to the party asserting the injury, show
20 that the defendant's conduct violated a constitutional right. *Id.* at 201. If the reviewing court
21 concludes that no constitutional right was violated by the defendant's conduct, the court need not
22 inquire further. *Id.* However, if the reviewing court concludes that a constitutional right was violated,
23 the court must then determine whether the right was clearly established. *Id.* And, "[t]he relevant,
24 dispositive inquiry in determining whether a right is clearly established is whether it would
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1 be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Saucier*,
2 533 U.S. at 202.

3 In accordance with the standard set forth above, this Court first considers whether Detective
4 Hale’s conduct violated a constitutional right. Plaintiff asserts that Detective Hale violated his rights
5 under the Fourth Amendment by unreasonably demanding and seizing his DNA pursuant to the search
6 warrant. The Fourth Amendment protects the “right of the people to be secure in their persons,
7 houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. Amend. IV.
8 Search warrants are generally required for searches involving intrusion into the human body. *See*
9 *Schmerber v. State of California*, 384 U.S. 757, 770 (1966). The purpose of a warrant is to allow a
10 neutral and detached decision maker, rather than the police, to assess whether the police have probable
11 cause to conduct a search. *Steagald v. United States*, 451 U.S. 204 (1981). *See also, United States v.*
12 *Leon*, 468 U.S. 897 (1984).

13 The record before this Court makes clear that a search warrant was obtained from a judicial
14 officer before plaintiff’s DNA was collected. Plaintiff does not contend that probable cause for
15 issuance of the warrant was inadequate. And, in fact, plaintiff concedes that he volunteered his DNA
16 during the course of his conversation with Detective Hale on November 15, 2005. (*See* Dkt. No. 6 at
17 7 and 31.) Because plaintiff’s DNA was collected pursuant to a facially valid warrant, and because
18 plaintiff apparently consented to the collection of his DNA, plaintiff’s Fourth Amendment claim fails as
19 a matter of law.

20 Plaintiff also complains that Detective Hale failed to advise him of his Miranda rights before
21 seizing his DNA. The United States Supreme Court has recognized that the procedural safeguards set
22 forth in *Miranda v. Arizona*, 384 U.S. 436 (1966), are not themselves rights protected by the
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1 Constitution but are, instead, measures to prevent violations of the right against compulsory self-
2 incrimination. *See Chavez v. Martinez*, 538 U.S. 760, 772 (2003). However, the Supreme Court has
3 also recognized that while the privilege against self-incrimination bars compulsion of an accused's
4 communications or testimony, it does not bar compulsion of physical evidence which "[is] neither
5 petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner."
6 *Schemerber*, 384 U.S. at 764-65. The physical evidence which Detective Hale sought to collect from
7 plaintiff; *i.e.*, his DNA, did not have any communicative or testimonial component and, thus, Detective
8 Hale was not required to advise plaintiff of his Miranda rights prior to collecting the oral swabs.
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10 Finally, plaintiff complains that Detective Hale failed to provide him with counsel before
11 seizing his DNA. The Sixth Amendment to the United States Constitution guarantees that, in all
12 criminal prosecutions, the accused shall have the right to the assistance of counsel for his defense.
13 U.S. Const. Amend. VI. This right is guaranteed at any critical stage of the prosecution. *United*
14 *States v. Wade*, 388 U.S. 218, 226 (1967). However, the collection and analysis of physical evidence
15 is not deemed a critical stage at which the accused has the right to the presence of counsel. *See id.* at
16 227-8. The alleged failure of Detective Hale to ensure the presence of counsel for plaintiff prior to
17 collecting his DNA therefore does not implicate federal constitutional concerns.
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20 It is clear from the record that Detective Hale's collection of plaintiff's DNA pursuant to the
21 warrant issued by Judge Keau, did not violate any of plaintiff's federally protected rights. Thus,
22 Detective Hale is entitled to judgment as a matter of law to the extent plaintiff contends that the actual
23 seizure of his DNA was unconstitutional.
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1 In addition to the claims which arise out of the actual seizure of his DNA, plaintiff also asserts
2 a number of claims which arise out of the manner in which Detective Hale conducted his investigation.
3 According to plaintiff, before Detective Hale initiated his investigation against plaintiff, plaintiff was
4 housed in a trustee unit at SDSP. (*See* Dkt. No. 6 at 7.) However, after Detective Hale arrived to
5 collect plaintiff's DNA pursuant to the warrant, plaintiff was transferred to a high security unit where
6 he was strip searched and required to dress in a prison uniform. (*Id.*) Plaintiff was subsequently held
7 in the high security unit for four weeks before being moved to a medium security facility. (*See id.* at
8 7-8.) After being moved to the medium security facility, and upon the advice of the warden of that
9 facility, plaintiff sent a kite to SDSP Special Security inquiring about the results of his DNA test. (*Id.*
10 at 8.) Plaintiff contends that as a result of that kite he was placed in segregation and stripped of all of
11 his privileges for two weeks. (*See id.* at 8-9.)
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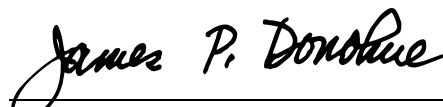
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14 Plaintiff believes that the actions of SDSP prison officials were unconstitutional and,
15 apparently, that Detective Hale should be held responsible for those actions because they resulted from
16 his investigation. Plaintiff has established no constitutional deficiency in the manner in which
17 Detective Hale conducted his investigation. While it does appear from the record that plaintiff was
18 subjected to more restrictive housing assignments within the SDDOC during the pendency of
19 Detective Hale's investigation, the assignments were made pursuant to SDDOC policy and are not
20 directly attributable to Detective Hale. Plaintiff's concerns regarding the conditions of his confinement
21 in the SDDOC are properly raised in South Dakota.
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23 CONCLUSION

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25 Based upon the foregoing, this Court recommends that defendants' motion for summary
26 judgment be granted and that plaintiff's complaint, and this action, be dismissed with prejudice. A

1 proposed order accompanies this Report and Recommendation.

2 DATED this 11th day of February, 2008.

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5 JAMES P. DONOHUE
6 United States Magistrate Judge
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